The truth is that the 3rd appellant should have been charged under section 114(i)(e) with causing tobacco to be harboured by the other two appellants or, if he was not so charged originally, the charge should have been amended to that effect by the learned President in the course of the trial. The very fact that the learned President failed thus to amend the charge fortifies me in the opinion I have already stated that he overlooked the distinction between section 99 and section 114(ii), and this oversight in my opinion amounted to a substantial misdirection. In the case of the first two appellants this misdirection has led me to quash their convictions because in their cases I have not the slightest doubt on the recorded evidence that had the learned President directed himself correctly he would have been bound to acquit them. As regards the third appellant, however, the state of the evidence is not such as to enable me to say with any certainty at what conclusion the learned President would have arrived had he directed himself correctly. In his case, therefore, while I am compelled to quash his conviction for reasons which will be abundantly clear from what I have said I order that he be retried on a charge framed under section 114(i)(e).

Conviction of 1st and 2nd appellants quashed — Retrial of 3rd appellant ordered.

In re LEE SIEW KOW, Deceased YEO SIEW NEO (w) v. GAN ENG NEO (w) & ORS.

[Court of Appeal (Sir Charles Murray-Aynsley, C.J. (Singapore), Mathew, C.J. (F.M.) and Brown, J.) July, 15, 1952]

[Singapore — Civil Appeal No. 13 of 1952]

Chinese marriage — Secondary wife — Kept mistress — Intention to form a permanent union.

This was an appeal from a judgment of Rogers, J. rejecting the appellant's claim that she was tsip or secondary wife of the deceased. It was argued by counsel for the appellant that the judgment in Re Lee Choon Guan decd.,(1) relied upon by the learned trial Judge, was erroneous in that it decided that recognition by the family of the alleged husband was not merely evidentiary but essential to the validity of a secondary marriage. In the present case there was admittedly no such recognition, but the learned trial Judge did not base his decision merely on that ground but on the evidence generally.

Held, that on the evidence the learned trial Judge was justified in deciding that the appellant was not a tsip.

Per Mathew, C.J. (F.M.): An agreement to keep a woman is not equivalent to an agreement to marry her; strong evidence that a woman is a kept mistress negatives the inference that a marriage has taken place.

Per Brown, J.: In order to establish a claim to be a secondary wife a consensual marriage must be proved. The means by which the mutual consent to marry is to be proved is a matter of evidence in each case.

Er Gek Cheng v. Ho Ying Seng(3) followed.

Cases referred to :—

(1) *Re Lee Choon Guan, decd.* (1935) M.L.J. 78.

(2) *Tan Ah Bee v. Foo Koon Thye* (1947) M.L.J. 169.

(3) *Er Gek Cheng v. Ho Ying Seng* (1949) M.L.J. 171.

COURT OF APPEAL.

N. A. Mallal for the appellant.

K. A. Seth and R. H. Green for the respondents.

Cur. Adv. Vult.

Sir Charles Murray-Aynsley, C.J., (Singapore): — In this case appellant had claimed to be a *tsip* of the deceased. At the hearing the learned Judge found that she was not. The appeal raised questions of law and fact. In his judgment the learned Judge cited and relied upon the judgment of Terrell, J., in the case of *Re Lee Choon Guan, decd.*(1). It was contended that this judgment was erroneous in that it decided that recognition by the family of the alleged husband was not merely evidentiary but essential to the validity of a secondary marriage. It is true that the perusal of the judgment might give that impression, but I do not think that the learned Judge acted on that assumption. In the present case there was admittedly no such recognition but the learned Judge did not base his decision merely on that ground but on the evidence generally. I do not think, therefore, that the judgment was based upon an erroneous view of the law.

Objection was also taken to a quotation, referred to with approval, from a judgment of Carey, J., in the case of *Tan Ah Bee v. Foo Koon Thye*(2), which reads as follows :—

"When one appreciates that a secondary wife may be acquired with so little formality and when acquired, she and her children, if any, in the event of an intestacy, share in the estate of the late husband, there is, if marriage is to remain a recognized honourable estate, an urgent necessity to ensure that a mistress or kept woman and her children, if any, should not step in to minimize the shares on distribution of the legal wives and children of the deceased."

I regard that passage as unfortunate. There is no sanctity about a Chinese marriage whether in the case of a *tsai* or a *tsip*. The Chinese idea of any marriage is purely secular, a matter of contract. In any case it is too late to object to secondary marriages, and if one decides in favour of one side in any case, it is usually to the detriment of the other. I think that all that passage really means is that one should not let sympathy overlook the weight of evidence. This is true but trite.

I do not think that the judgment is based on an erroneous view of the law. Therefore, the appeal must be regarded as an appeal of fact.

The learned Judge decided that the appellant was not a *tsip*. Can that finding be justified on the evidence? The effect of the evidence is accurately summarised in the judgment appealed against. I do not think that it is necessary to go through it in detail. Certain observations may be made. At the beginning the deceased simply visited the appellant in the place where she lived with her adopted mother. This does not indicate that from the beginning the appellant had the status of a *tsip*. Later the deceased set the appellant and her adoptive mother in various houses and in them entertained at one time quite lavishly. Here the appellant was treated as a wife and so far as this type of evidence goes it is in favour of the appellant. It is not, however, conclusive. On such occasions a woman may very well be treated as a wife without being one. The witnesses who deal with this part of the case were either relatives of the appellant or persons who attended parties given by the appellant and the deceased. None of them seems to have been what may be called intimate friends of the deceased. Certainly none of the family knew anything about the appellant.

During the trial the advisers of the respondent discovered a very valuable piece of evidence. It appears that the appellant and the deceased quarrelled. The appellant took proceedings against the deceased. A writ was issued, followed by a statement of claim. The claim was based on the allegation that the appellant was the kept mistress of the deceased. As has been pointed out, if she were a wife she would not have had a right of action. Therefore, it cannot be assumed that it was a case of inadvertence or *falsa descriptio*. Before delivering the pleadings the solicitors concerned must have enquired into the facts as far as were known to them. In view of this it is at any rate impossible to disturb the finding of fact that as late as March, 1941, the appellant had not acquired the status of a *tsip*.

The action was settled and shortly afterwards the parties were reconciled and their association continued until the death of the deceased on July 18, 1951. But soon after the reconciliation the Japanese invasion and occupation followed. During the occupation they seem to have met occasionally, but their meetings were rendered more difficult by the conditions prevailing. After the war the deceased seems to have been ailing and to have lived a quieter life. In any event the great bulk of the evidence of reputation refers to the period before legal proceedings of 1941. In the later period I am quite unable to find evidence of anything which could have converted the appellant into a *tsip*. Her story in the Court below was that there was agreement at the inception of the relationship. There is no evidence of anything but the resumption of what had existed previously. There is nothing to indicate the creation of a fresh status.

It was contended that when the learned Judge found that in the early days there was an intention to form a permanent union, he had by that finding decided that there was in fact a marriage. I do not agree. No doubt usually when people agree to form a permanent union they do in fact agree to marry, but it is possible so to agree and at the same time avoid the advantages and disadvantages of matrimony. That appears to be the case here.

I can see no reason to disturb the findings of the learned Judge. In my opinion the appeal should be dismissed with costs. Deposit to be paid out to respondents.

Mathew, C.J., (F.M.) : — This is an appeal from a judgment rejecting the appellant's claim that she was the *tsip* or secondary wife of the deceased man Lee Siew Kow. Counsel for the appellant has argued that the learned judge's conclusions were based on a misconception of the law, in that he relied on the proposition of law set out in the case of *Re Lee Choon Guan decd.*[1], that no claim to be a secondary wife could be successful unless she established (a) long continual cohabitation, (b) an intention to form a permanent union, and (c) repute of marriage. Counsel further argued that the learned trial judge, having found as a fact that there was long continued cohabitation and an intention to form a permanent union, that mutual agreement to become husband and secondary wife should in the absence of satisfactory direct evidence on the point be inferred.

At first sight there appears to be some substance in this contention, but a careful study of the learned trial judge's judgment reveals that he based his decision on the evidence generally and found that there was in fact no marriage. In his judgment in *Er Gek Cheng v. Ho Ying Seng*[3], the learned Chief Justice has set out with great clarity the law of the Colony on the subject of the acquisition of the status of a *tsip* or secondary wife, and has removed certain obscurities which clouded earlier decisions. He has laid down that for the legal requirements of a marriage with a *tsip* the law of the Colony merely requires a consensual marriage and that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a *tsip*. With this exposition of the law I am in complete agreement.

The learned judge, in my view, rightly held that the evidence showed that in 1941 the appellant was a kept mistress and that there was nothing in their post-war relationship which would justify his holding that she had become a secondary wife thereafter. The evidence in the case shows clearly that the position of the appellant in 1941 was that of a kept mistress, and indeed it would have been difficult for the learned trial judge to come to any other conclusion, having regard to the proceedings which were initiated by the appellant against the deceased in 1941. Counsel for the appellant's contention, that a marriage should be inferred from the learned trial judge's finding that prior to 1941 there had been an agreement to form a permanent union, cannot be sustained. For obvious reasons an agreement to keep a woman is not equivalent to an agreement to marry her; strong evidence that a woman is a kept mistress negatives the inference that a marriage has taken place. The evidence regarding repute of marriage is slender and for the most part relates only to the pre-occupation days.

In my view, the learned judge was correct in finding that the appellant had failed to prove that she was a secondary wife. I would dismiss this appeal with costs, and order the deposit in Court to be paid out to the respondents against their costs.

Brown, J.: — It seems to me that the first paragraph of the head-note to the case of *Re Lee Choon Guan, decd.*[1] is misleading, since it appears to lay down a general rule that in order to establish a Chinese secondary marriage the plaintiff must prove the three elements which are therein set out. But I cannot find that any such general rule is laid down in the Judgment. The three elements were contained in a submission by Counsel, which he was making on the facts of that case. And they were accepted by the learned Judge as a convenient basis on which to review the evidence which was before him in that case. I can see nothing in that decision which is at variance with the later decision in *Er Gek Cheng v. Ho Ying Seng*[3]. And I think that upon the authorities the law can now be regarded as settled that in order to establish a claim to be a secondary wife a consensual marriage must be proved. The means by which the mutual consent to marry is to be proved is a matter of evidence in each case. How can it be said, for example, that in a case where the plaintiff produces documentary evidence of a formal contract to marry, coupled with evidence of long cohabitation, it is necessary to go further and establish marriage by repute? Similarly where the evidence establishes that the plaintiff has been accepted and recognised by the deceased's principal wife and family that would be almost as conclusive as a formal contract. But the absence of such recognition does not of necessity disprove the marriage. A clandestine marriage, which is unknown to the family, is legally possible, though it may be hard to prove. I think that the three elements referred to in the head-note of the *Lee Choon Guan*[1] case are valuable as a guide to what the Court will look for in a case where there is no conclusive evidence on which to base its decision, and that they may be taken as a sound basis on which to review the evidence.

In the present case the learned Judge followed the head-note and considered that the onus was on the appellant to establish (a) cohabitation, (b) an intention to form a permanent union and (c) repute of marriage. For the reasons which I have given I do not think that that correctly stated the burden which lay upon the appellant. The appellant had to establish a consensual marriage — no more and no less. But, as the learned Judge rightly said, all three matters were questions of fact. He reviewed the evidence under those three headings. Mr. Mallal argued that having found as a fact that there was an intention to form a permanent union that should have concluded the matter. If he had found as a fact that there was a mutual intention to form a permanent union in marriage I should agree with Mr. Mallal, and I should say that having also found cohabitation he ought not to have required the appellant to establish the third element of marriage by repute. But he did not find that the permanent union which it was intended to form was a permanent union in marriage. And if he had I think we should have had to consider whether, having regard to the whole of the evidence — particularly the evidence relating to the legal proceedings in 1941 — such a finding was not contrary to the weight of evidence.

In my opinion the learned Judge's finding that the appellant had failed to prove her claim to have been a secondary wife was correct upon the evidence which was before him, and I think that this appeal should be dismissed.

Appeal dismissed.

SULTAN MOHAMED v. REGINA.

[App. Cr. Juris. (Brown, J.) September 3, 1952]
[Singapore — Magistrate's Appeal No. 113 of 1952]

Penal Code, s. 324 — Weapon of offence — What is — Magistrate's grounds of judgment — What it should contain.

The question, in determining whether the charge is properly laid under section 324, is whether the instrument, is intrinsically likely to cause death; not whether the instrument, if used in a certain way, might cause death.

The Magistrate ought to show in his grounds of judgment that the defence has been carefully considered and his reasons for rejecting it.